No. 43471-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Nainoa Fontaine,

Appellant.

Thurston County Superior Court Cause No. 12-1-00054-2

The Honorable Judge Gary R. Tabor

Appellant's Opening Brief

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2. The trial court erred by failing to instruct jurors that Mr. Fontaine had "no burden of proving that a reasonable doubt exists."

3. The trial court erred by giving Instruction No. 3.

4. The accomplice liability statute is unconstitutionally overbroad.

5. Mr. Fontaine was convicted through operation of a statute that is unconstitutionally overbroad.

6. The trial judge erred by giving Instruction No. 9, which defined accomplice liability to include mere advocacy, in violation of the First and Fourteenth Amendments

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires that jury instructions properly outline the burden of proof in a criminal trial. Here, the trial court violated a Supreme Court directive by using a nonstandard instruction which omitted essential language (that an accused person has "no burden of proving that a reasonable doubt exists."). Did the trial court's nonstandard instruction infringe Mr. Fontaine's right to due process under the Fourteenth Amendment and Wash. Const. Article I, Section 3?

2. A statute is unconstitutional if it criminalizes speech that is not directed at and likely to incite imminent lawless action. The accomplice liability statute criminalizes speech made with knowledge that it will facilitate or promote commission of a crime, even if not directed at and likely to incite imminent lawless action. Is the accomplice liability statute unconstitutionally overbroad in violation of the First and Fourteenth Amendments?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Daniel Gault was a heroin user. RP 41, 128. He lived with his girlfriend Heather Inks, who also used heroin, and her 4 year old daughter. RP 83, 90, 128.

In January of 2012, Nainoa Fontaine was having issues with his sister. Because of this, he was staying with Gault and Inks temporarily. RP 149, 440. Like Gault and Inks, Mr. Fontaine also used heroin. RP 440.

On January 7, 2012, Gault and Inks were out of heroin and were concerned about getting sick from withdrawal. RP 91-92, 131-132, 150. Mr. Fontaine texted his friend Jaffney Gohl to bring some heroin to the house. She agreed. RP 41-46, 443-444.

When Gohl arrived, along with her dealer Beau Hymas, Daniel Gault came out of his room with a pellet gun. RP 52, 60, 154, 156, 220. He demanded the drugs and whatever money they had, and pointed the pellet gun at both Hymas and Gohl. RP 53, 70, 138, 147. Mr. Fontaine came out of his room and stood at the door, close to where Hymas and

Gohl stood. RP 52, 138, 224, 245. Hymas and Gohl handed off the heroin and money and left.[1] RP 52-54, 73, 139, 456-457.

Gault, Inks and Fontaine all used the heroin that Gault had just obtained. RP 104-105, 140.

Following this incident, Hymas and Gohl went to pick up a friend named Santella; they brought him back to Gault's house. RP 59, 228-230. When Hymas and Santella knocked on the door, Gault answered it. RP 140, 230-231. Gault and Santella fought on the porch and in front of the house. RP 230, 462. Gault had a knife and stabbed Santella. RP 108, 109, 140, 234. Inks shouted to Mr. Fontaine to help Gault; Mr. Fontaine went out but took no action. RP 106, 234, 463. Hymas and Santella left. RP 467.

Police were called and went to the house. While they were outside, Mr. Fontaine went outside and told them that Gault had been attacked. RP 477-480. He didn't tell police about the earlier robbery by Gault, or about the heroin they'd all been using.[2] RP 24, 480. He also

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[1] There was conflicting evidence regarding Mr. Fontaine's involvement. According to Hymas, Mr. Fontaine blocked the exit and took the money and drugs. RP 224. By contrast, Gohl didn't remember who took the items, and Mr. Fontaine denied blocking the door. RP 53-54, 73, 452-453.

[2] None of the participants readily explained to law enforcement the facts relating to Gault's robbery. RP 70, 173-174, 239.

texted Gault that police were outside and that he should leave the area. RP 116, 375-376.

Police eventually found the knife Gault had used. RP 278, 283. The state charged Gault with robbery in the first degree and assault in the second degree, with a deadly weapon enhancement. Gault pled guilty. RP 129.

Mr. Fontaine was charged with robbery in the first degree and rendering criminal assistance in the first degree. CP 4. His case proceeded to trial.

Gohl testified that it didn't seem to her that Mr. Fontaine wanted any part of the robbery. RP 53. Gault said that he hadn't discussed his plan (to rob Hymas and Gohl) with Mr. Fontaine at all. RP 135, 147, 166. Mr. Fontaine testified that he did not plan or participate in the robbery committed by Gault.[3] RP 452-458, 480, 482, 508, 552.

The court gave a non-standard jury instruction outlining the state's burden of proof. The instruction omitted language that "The defendant has no burden of proving that a reasonable doubt exists." CP 5-17. The court also defined the word "aid" in the context of accomplice liability as

[3] Mr. Fontaine did acknowledge that he was guilty of rendering criminal assistance. RP 452-458, 480, 482, 508, 552.

"all assistance whether given by words, acts, encouragement, support or presence..." CP 13.

The jury convicted Mr. Fontaine of robbery in the first degree and rendering criminal assistance in the first degree. RP (5/15/12) 3-7. After sentencing, Mr. Fontaine timely appealed. CP 31-40, 20-30.

ARGUMENT

I. MR. FONTAINE'S CONVICTION INFRINGED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT'S NONSTANDARD INSTRUCTION FAILED TO TELL JURORS THAT MR. FONTAINE HAD NO BURDEN TO PROVE THAT A REASONABLE DOUBT EXISTS.

A. Standard of Review

Constitutional questions are issues of law, reviewed de novo. McDevitt v. Harborview Med. Ctr., ___ Wash.2d___, ___, ___ P.3d ___ (2012). Jury instructions are also reviewed de novo. Anfinson v. FedEx Ground Package Sys., Inc., 174 Wash.2d 851, 860, 281 P.3d 289 (2012). Instructions must make the relevant legal standard manifestly apparent to the average juror. State v. Kyllo, 166 Wash.2d 856, 864, 215 P.3d 177 (2009). A manifest error affecting a constitutional right may be raised for

the first time on review.[4] RAP 2.5(a)(3); State v. Kirwin, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009).

B. The Washington Supreme Court has approved WPIC 4.01 as the only permissible instruction for defining the burden of proof in a criminal case.

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. The state constitution provides similar protection. Wash. Const. Article I, Section 3. In a criminal prosecution, due process requires the government to prove each element of the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The accused person "has no burden to present evidence." State v. Montgomery 163 Wash.2d 577, 598, 183 P.3d 267 (2008).

The Washington Supreme Court has exercised its "inherent supervisory authority to instruct Washington trial courts to use only the approved pattern instruction WPIC 4.01 to instruct juries that the government has the burden of proving every element of the crime beyond a reasonable doubt." State v. Bennett, 161 Wash.2d 303, 318, 165 P.3d

[4] The court may also accept review of other issues argued for the first time on appeal, including constitutional errors that are not manifest. RAP 2.5(a); see State v. Russell, 171 Wash.2d 118, 122, 249 P.3d 604 (2011).

1241 (2007) (emphasis added). The Court noted that "every effort to improve or enhance the standard approved instruction necessarily... shifts, perhaps ever so slightly, the emphasis of the instruction." Bennett, at 317.

In addition, a nonstandard instruction that fails to properly instruct on the burden of proof is "a grievous constitutional failure." State v. McHenry, 88 Wash.2d 211, 214, 558 P.2d 188 (1977). Such an instruction violates due process, and requires reversal if the accused person was denied a fair trial "in light of the totality of the circumstances--including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors..." Kentucky v. Whorton, 441 U.S. 786, 789, 99 S.Ct. 2088, 60 L.Ed.2d 640 (1979) (citing Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978)); see also Matter of Lile, 100 Wash.2d 224, 228, 668 P.2d 581 (1983) (adopting the Whorton standard under Article I, Section 3).

C. The trial court's nonstandard instruction outlining the burden of proof created a manifest error affecting Mr. Fontaine's Fourteenth Amendment right to due process.

The mandatory instruction approved by the Supreme Court for use in criminal trials reads (in relevant part) as follows:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime

> beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

WPIC 4.01 (emphasis added) (certain bracketed materials omitted).

Division I has held that failure to use WPIC 4.01 requires reversal, unless the instruction used in its place is an improvement upon WPIC 4.01. State v. Castillo, 150 Wash.App. 466, 472-473, 208 P.3d 1201 (2009). By contrast, Division II has held that failure to use WPIC 4.01 is subject to harmless error analysis. State v. Lundy, 162 Wash.App. 865, 870-871, 256 P.3d 466 (2011).[5] In Lundy, the trial court used a modified instruction, which differed only slightly from the pattern instruction. Lundy, at 870-71. The Lundy court found that the instruction correctly communicated the standards set forth in WPIC 4.01:

> [The instruction] emphasized the presumption of innocence... Furthermore, [it] accurately described the State's burden of proof by clearly instructing the jury that the State must prove each element of the crimes charged beyond a reasonable doubt and that the defendant has no burden of proving that a reasonable doubt exists.

Id, at 873 (emphasis added).

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[5] A recent decision noted Bennett's holding that the Castle instruction is not constitutionally deficient. State v. Castle, 86 Wash.App. 48, 935 P.2d 656 (1997); State v. Jimenez-Macias, ___ Wash.App. ___, ___, 286 P.3d 1022 (2012). The Jiminez-Macias court erroneously suggested that Lundy addressed "a Castle instructional error." Jiminez-Macias, at ____. This is not quite correct: the instruction at issue in Lundy was not a Castle instruction; instead, the Lundy court found harmless a version of WPIC 4.01 that "modified the WPIC by reversing the order of the first two paragraphs and modifying the first three sentences of the paragraph on the State's burden of proof." Lundy, at 871. The instruction in Lundy did not contain the offending Castle language at issue in Bennett; nor did it omit the sentence missing from the instruction in this case. Id.

In contrast to Lundy, the trial court's instruction outlining the burden of proof in this case failed to explicitly tell jurors that Mr. Fontaine had "no burden of proving that a reasonable doubt exists." See Instruction No. 3, CP 5-17; cf WPIC 4.01. The deficiency was not remedied elsewhere in the court's instructions. See Instructions, generally, CP 5-17.

Unlike the instructions in Bennett and Lundy, Instruction No. 3 provided an incomplete statement regarding the burden of proof by neglecting to tell jurors that the accused person had no burden. In other words, Instruction No. 3 did not make the relevant standard manifestly apparent to the average juror. Kyllo, at 864. The effect of this was to leave open the possibility that Mr. Fontaine had the burden of raising a reasonable doubt. The instruction that persuaded Division I to reverse in Castillo was characterized by this same omission.[6] Castillo, at 473.

The nonstandard instruction used by the trial court in this case is not the "simple, accepted, and uniform instruction" adopted by the Supreme Court. Bennett, at 318. Instead, by leaving out required language, Instruction No. 3 "shifts, perhaps ever so slightly, the emphasis of the instruction." Bennett, at 318. The omission of an important component of the burden of proof created a manifest error affecting Mr. Fontaine's right

[6] The instruction in that case suffered from other flaws as well.

to due process under the state and federal constitutions. Accordingly, the error may be raised for the first time on review. RAP 2.5(a)(3).[7]

D. The trial court's erroneous instruction outlining the burden of proof error was not harmless beyond a reasonable doubt.

Under Castillo, the error here would require automatic reversal. The Castillo court reasoned that the Supreme Court's clear and unambiguous directive did not allow for any exceptions. Castillo, at 472-473. In Division I, the only nonstandard version of WPIC 4.01 that could survive analysis under Bennett would be one that improves upon the pattern instruction. Id, at 473. The court concluded that the error here is sufficient to require reversal because it is not an improvement on the standard instruction:

> The omission of the last sentence of WPIC 4.01 from the given instruction alone warrants the conclusion that Instruction No. 3 is not better than the WPIC.

Id.

In Division II, however, an erroneous instruction on the burden of proof is subject to harmless error analysis under the stringent test for constitutional error. Lundy, at 872.

[7] Furthermore, even if not "manifest," the error is significant, and the court should exercise discretion to review its merits. Russell, at 122.

Constitutional error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. State v. Irby, 170 Wash.2d 874, 886, 246 P.3d 796 (2011); City of Bellevue v. Lorang, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. Lorang, at 32. Reversal is required unless the state can prove that any reasonable fact-finder would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. State v. Burke, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

The error here is not harmless beyond a reasonable doubt. First, the error was not "trivial, formal, or merely academic." Lorang, at 32. The instruction omitted an essential component of the burden of proof: the rule that an accused person need not raise a reasonable doubt in order to be acquitted. CP 9. Because the burden of proof forms part of the bedrock upon which the entire criminal justice system rests, errors in communicating the standard will seldom, if ever, be considered harmless.

Second, there is at least some possibility that the deficient instruction prejudiced Mr. Fontaine and affected the final outcome of the case. Lorang, at 32. At trial, Mr. Fontaine sought to suggest that he was a

bystander rather than a participant in the robbery. RP 452-458, 480, 482, 508, 552. As a result of the erroneous instruction, jurors likely believed that Mr. Fontaine bore the burden of raising a reasonable doubt as to his participation.

Third, a reasonable factfinder could have concluded that Mr. Fontaine did not participate in the robbery. He testified that he did not know Gault planned to rob Hymas and Gohl, and that he was coerced into accepting the money and drugs from Gault. RP 454-459, 508, 510. Under these circumstances, it cannot be said that the evidence of accomplice liability was so overwhelming that it would necessarily lead to a finding of guilt. Burke, supra.

Fourth, jurors could have had a reasonable doubt that the pellet gun used by Gault did not appear to be a firearm or other deadly weapon, as required for conviction of first-degree robbery in this case. Thus it cannot be said that the evidence was overwhelming on this element of the offense. Burke, supra.

For all these reasons, the state cannot prove beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. Lorang, at 32. Accordingly, the robbery conviction must be reversed and the case remanded for a new trial. Id.

II. THE ACCOMPLICE LIABILITY STATUTE IS OVERBROAD BECAUSE IT CRIMINALIZES CONSTITUTIONALLY PROTECTED SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

A. Standard of Review.

Constitutional violations are reviewed de novo. McDevitt, at ___. A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); Kirwin, at 823. A reviewing court "previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." . State v. Walsh, 143 Wash.2d 1, 17 P.3d 591 (2001).[8] An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. State v. Nguyen, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

Free speech challenges are different from most constitutional challenges to statutes; under the First Amendment, the state bears the burden of justifying a restriction on speech. State v. Immelt, 173 Wash. 2d 1, 6, 267 P.3d 305 (2011).

[8] The policy is designed to prevent appellate courts from wasting "judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits." State v. WWJ Corp., 138 Wash.2d 595, 603, 980 P.2d 1257 (1999).

B. Any person accused of violating an overbroad statute may challenge the constitutionality of the statute on First Amendment grounds; facts are not essential.

The First Amendment to the U.S. Constitution provides that "Congress shall make no law... abridging the freedom of speech." U.S. Const. Amend. I. This provision is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; Adams v. Hinkle, 51 Wash.2d 763, 768, 322 P.2d 844 (1958) (collecting cases).[9] A statute is overbroad if it sweeps within its prohibitions a substantial amount of constitutionally protected speech or conduct. Immelt, at ___.

Anyone accused of violating such a statute may bring an overbreadth challenge; she or he need not have engaged in constitutionally protected activity or speech. Immelt, at ___. An overbreadth challenge will prevail even if the statute could constitutionally be applied to the accused. Immelt, at ___. In other words, "[f]acts are not essential for consideration of a facial challenge...on First Amendment grounds." City of Seattle v. Webster, 115 Wash.2d 635, 640, 802 P.2d 1333 (1990), cert. denied, 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991).

The First Amendment overbreadth doctrine is thus an exception to the general rule regarding the standards for facial challenges. U.S. Const.

[9] Washington's constitution gives similar protection: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." Wash. Const. Article I, Section 5.

Amend. I; Virginia v. Hicks, 539 U.S. 113, 118, 156 L.Ed.2d 148, 123 S.Ct. 2191 (2003). Instead of applying the general rule for facial challenges, "[t]he Supreme Court has 'provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.'" United States v. Platte, 401 F.3d 1176, 1188 (10th Cir. 2005) (quoting Hicks, at 119); see also Conchatta Inc. v. Miller, 458 F.3d 258, 263 (3rd Cir. 2006).

Mr. Fontaine's jury was instructed on accomplice liability. Instruction No. 9, CP 13. Accordingly, Mr. Fontaine is entitled to bring a challenge to the accomplice liability statute, regardless of the facts of his case. Hicks , at 118-119; Webster , at 640.

C. The accomplice liability statute is overbroad because it criminalizes pure speech that is not directed at inciting imminent lawless action.

The First Amendment protects speech advocating criminal activity: "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." Ashcroft v. Free Speech Coal., 535 U.S. 234, 253, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). Because of this, speech advocating criminal activity may only be punished if it "is directed to inciting or producing imminent lawless action and is likely to incite or

produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447, 23 L.Ed.2d 430, 89 S.Ct. 1827 (1969).

The accomplice liability statute (RCW 9A.08.020) is unconstitutionally overbroad because it criminalizes speech protected by the First Amendment. Under RCW 9A.08.020, one may be convicted as an accomplice if he, acting "[w]ith knowledge that it will promote or facilitate the commission of the crime... aids or agrees to aid [another] person in planning or committing it." The statute does not define "aid." No Washington court has limited the definition of aid to bring it into compliance with the U.S. Supreme Court's admonition that a state may not criminalize advocacy unless it is directed at inciting (and likely to incite) "imminent lawless action." Brandenburg , at 447-449.

Washington courts, including the trial judge here, have adopted a broad definition of aid: "The word 'aid' means all assistance whether given by words, acts, encouragement, support, or presence." See WPIC 10.51; Instruction No. 9, CP 13. By defining "aid" to include assistance... given by words... [or] encouragement...", the instruction criminalizes a vast amount of pure speech protected by the First Amendment, and runs afoul of the U.S. Supreme Court's decision in Brandenburg.

Thus, for example, Washington's accomplice liability statute would criminalize the speech protected by the U.S. Supreme Court in Hess

v. Indiana, 414 U.S. 105, 107, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) ("We'll take the fucking street later [or 'again']"), in Ashcroft (virtual child pornography found to encourage actual child pornography), and Brandenburg itself (speech "'advocat(ing) * * * the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform'") (quoting Ohio Rev. Code Ann. s 2923.13).

It is possible to construe the accomplice statute in such a way that it does not reach constitutionally protected speech and conduct. Indeed, the U.S. Supreme Court has formulated appropriate language for such a construction. Brandenburg, supra. However, such a construction has yet to be imposed. The prevailing construction—as expressed in WPIC 10.51 and adopted by the trial court in Instruction No. 9—is overbroad; therefore, RCW 9A.08.020 is unconstitutional. Brandenburg, supra.

Mr. Fontaine's convictions must be reversed and the case remanded for a new trial. Brandenburg, supra. Upon retrial, the state may not proceed on any theory of accomplice liability. Id.

D. The Coleman and Ferguson courts applied the wrong legal standard in upholding RCW 9A.08.020, and should be reconsidered in light of established U.S. Supreme Court precedent.

The Court of Appeals has upheld Washington's accomplice liability statute. State v. Coleman, 155 Wash.App. 951, 231 P.3d 212

(2010), review denied, 170 Wash.2d 1016, 245 P.3d 772 (2011); State v. Ferguson, 164 Wash.App. 370, 264 P.3d 575 (2011). In Coleman, Division I concluded that the statute's mens rea requirement resulted in a statute that "avoids protected speech activities that are not performed in aid of a crime and that only consequentially further the crime." Coleman, at 960-961 (citations omitted). In Ferguson, Division II court adopted the reasoning set forth in Coleman. The court's decisions in Coleman and Ferguson are incorrect for two reasons.

First, Division I's analysis in Coleman—that the statute is constitutional because it does not cover "protected speech activities that are not performed in aid of a crime and that only consequentially further the crime"—is severely flawed, because the First Amendment protects much more crime-related speech than the "speech activities" described by the court. Coleman, at 960-961. For example, the state cannot criminalize speech that is "nothing more than advocacy of illegal action at some indefinite future time." Hess, at 108.

Contrary to Division I's reasoning, speech encouraging criminal activity is protected even if it is performed in aid of a crime and even if it directly furthers the crime, unless it is also "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg at, 447; cf. Coleman, at 960-961. Merely

examining the mens rea required for conviction is insufficient to save the statute, because a person can engage in criminal advocacy with the intent to further a particular crime and still be protected by the constitution.

Speech that "encourage[s] unlawful acts" is protected, unless it falls within the narrow category outlined by Brandenburg. Ashcroft, at 253. The state cannot ban all speech made with intent to promote or facilitate the commission of a crime; such speech can only be criminalized if it also meets the Brandenburg test. A conviction can only be sustained if the jury is instructed that it must find that the speech was (1) "directed to inciting or producing imminent lawless action..." and (2) "likely to incite or produce such action." Brandenburg at 447. The jury was not so instructed in this case. Thus, assuming (as the Coleman court claims) that the accomplice liability statute avoids the "protected speech activities" described, such avoidance is not enough to render the statute constitutional, if it also reaches other protected speech.

Second, the Coleman court applied the wrong legal standard in evaluating the statute. The U.S. Supreme Court has drawn "vital distinctions between words and deeds, between ideas and conduct." Ashcroft, at 253. The accomplice liability statute reaches pure speech: "words" and "encouragement" are sufficient for conviction, if accompanied by the proper mens rea. See WPIC 10.51; Instruction No. 9,

CP 13. Because the statute reaches pure speech, it cannot be analyzed under the more lenient First Amendment tests for statutes regulating conduct.

But the Coleman court ignored this distinction. Specifically, the Coleman court relied on cases dealing with laws regulating behavior. The court began its analysis by noting that "[a] statute which regulates behavior, and not pure speech, will not be overturned as overbroad unless the challenging party shows the overbreadth is both real and substantial in relation to the statute's plainly legitimate sweep." Coleman, at 960 (citing Hicks, at 122 and Webster, at 641.) The court then imported the Supreme Court's rationale from Webster and applied it to the accomplice liability statute:

> We find Coleman's case similar to Webster. Webster was charged under a Seattle ordinance banning intentional obstruction of vehicle or pedestrian traffic. The Washington Supreme Court explained the ordinance was not overbroad because the requirement of criminal intent prevented it from criminalizing protected speech activity that only consequentially obstructed vehicle or pedestrian traffic...In the same way, the accomplice liability statute Coleman challenges here requires the criminal mens rea to aid or agree to aid the commission of a specific crime with knowledge the aid will further the crime.

Coleman, at 960-61 (citation omitted). But (as noted) Webster involved the regulation of conduct—obstruction of vehicle or pedestrian traffic—and therefore, the statute could be upheld based on the distinction between

"innocent intentional acts which merely consequentially block traffic..." and acts performed with the requisite mens rea. Webster, at 641-642.

No such distinction is available here, because the accomplice liability statute reaches pure speech, unaccompanied by any conduct—i.e. speech that knowingly encourages criminal activity, including speech (words or encouragement) that is not directed at and likely to incite imminent lawless action. See WPIC 10.51; Instruction No. 9, CP 13. The First Amendment does not only protect "innocent" speech; it protects free speech, including criminal advocacy directly aimed at encouraging criminal activity, so long as the speech does not fall within the rule set forth in Brandenburg.

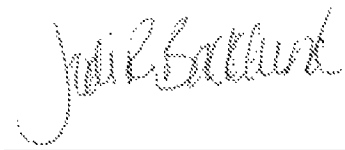
The Coleman court applied the wrong legal standard in upholding the accomplice liability statute. It should have analyzed the statute under Brandenburg instead of the test for conduct set forth in Webster. Accordingly, Coleman and Ferguson should be reconsidered.

CONCLUSION

For the foregoing reasons, Mr. Fontaine's robbery conviction must be reversed and the charge dismissed with prejudice. In the alternative, the case must be remanded for a new trial.

Respectfully submitted on January 8, 2013,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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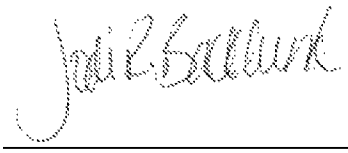
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 8, 2013.



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